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In the Supreme Court of the United States

October Term, 1953

No. 14

UNITED STATES OF AMERICA, *Appellant*

v.

FIVE GAMBLING DEVICES, LABELED IN PART, "MILLS", AND BEARING SERIAL NUMBERS 593,221; 578,827; 583,708; 578,831; AND 581,162

On Appeal from the United States District Court for the Middle District of Tennessee

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (R. 5-8) are not reported.

JURISDICTION

The order of the District Court dismissing the libel was entered on November 21, 1952 (R. 6). An amendment to the order was entered on December 22, 1952 (R. 10). A notice of appeal was filed on December 22, 1952 (R. 8), and on May 25, 1953, this Court noted probable jurisdiction (R. 12). The jurisdiction of the Supreme Court to review on direct appeal the judgment of a district court holding an Act of Congress unconstitutional in any civil action to which the United States is a party is conferred by 28 U.S.C. 1252. See also 28 U.S.C. 2101.

QUESTION PRESENTED

Whether the remedy of forfeiture may be constitutionally imposed against gambling devices sold in violation of the reporting and registration requirements of Section 3 of the Act of January 2, 1951, without proof of prior unlawful interstate transportation.

STATUTE INVOLVED

The statute involved (64 Stat. 1134, 15 U.S.C. (Supp. V) 1171, *et seq.*) is set forth in the Appendix to the Government's brief in Nos. 40 and 41. The pertinent provisions are quoted at p. 7, *infra*.

STATEMENT

On September 11, 1952, a libel of information was filed against five gambling devices (R. 1). The libel alleges that the machines were illegally sold

in July and October 1951, by Edwin Haley Clement and William King Wallis, doing business as Automatic Music Company, to the Greymere Country Club, Columbia, Tennessee, in violation of Section 3 of the Act of January 2, 1951. It was alleged that Clement and Wallis, being dealers in gambling devices within the meaning of Section 3 of that Act, had both failed to register under the Act and to render the reports giving the details of the sale of the devices to the Attorney General, as required by Section 3 thereof. It was further alleged that the devices were seized by federal agents on March 3, 1953, at the Greymere Country Club, Columbia, Tennessee, under the forfeiture provisions of the Act (Section 7). The devices are described by the serial number and the manufacturer's name affixed to each.

On October 13, 1952, the Greymere Country Club of Columbia, Tennessee, filed an intervening petition (R. 3-5) which, while not denying that the machines were sold to it by an unregistered dealer who failed to report the details of the transaction to the Attorney General as required by Section 3, alleges that Section 3 is unconstitutional and void under the Tenth Amendment of the Constitution, and that (R. 4) "* * * the Congress of the United States does not have the power or the authority to pass a law requiring a citizen of Tennessee to register his business with the Attorney General nor to report to the Attorney General the details of sales made by such citizen of Tennessee."

The facts as alleged in the libel of information were stipulated on the trial of the case which was held on November 19, 1952 (R. 7-8).

The District Court dismissed the libel on the ground that Section 3 of the Act was unconstitutional "in so far as it applies to purely intrastate matters" (R. 9, 10). The opinion of the District Court states that while (R. 5, 8) "* * * Congress might have a right to proceed against the dealer for selling the machines, * * *" it could not forfeit the machines themselves without a showing that "* * * there is any interstate commerce connected with the seizure, or that the machines were ever shipped in interstate commerce after the passage of the act * * *."

SPECIFICATION OF ERROR TO BE URGED

The Court below erred in holding that slot machines sold in violation of Section 3 of the Act of January 2, 1951, could not be forfeited to the United States if they had not been unlawfully transported in interstate commerce.

SUMMARY OF ARGUMENT

The forfeiture of slot machines sold by a dealer who has not complied with the registration and reporting requirements contained in Section 3 of the Slot Machine Act is a reasonable means of enforcing that provision. Since, as we have shown in our brief in the *Denmark* and *Braun* cases, Nos. 40 and 41, Section 3 may validly be applied to all

dealers in machines, including those not in interstate commerce, enforcement of that section through forfeitures may appropriately be given the same scope. Furthermore, the purpose of the statute is to keep the machines themselves out of states which do not want them, and this can best be done by seizing the machines. Failure to comply with the informational requirements will make it difficult or impossible to tell which machines have been illegally transported. Forfeiture of all machines illegally sold by dealers in violation of Section 3 is thus a reasonable method whereby Congress can prevent such dealers from gaining an advantage from their own wrongdoing and frustrating the statutory provisions which enable machines illegally transported and other machines to be distinguished. There is ample precedent for using the remedy of forfeiture to enforce informational requirements. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395. And the cases also established that forfeiture is not barred because the property may have been transferred to an innocent person.

ARGUMENT

Congress May Constitutionally Provide for the Forfeiture of Slot Machines Sold in Violation of the Informational Requirements Contained in Section 3 of the Slot Machine Statute Irrespective of Whether the Machines Have Been Unlawfully Transported in Interstate Commerce

In the Government's brief in *United States* v. *Denmark* and *Braun*, Nos. 40 and 41, we have argued that the informational requirements of the statute forbidding the interstate transportation of slot machines were constitutional as applied to dealers who may not themselves have engaged or transported machines in interstate commerce. This case involves the right of the Government to seize slot machines sold by dealers who have failed to comply with these provisions. The district court, following the opinion of Judge Briggle in *United States* v. *178 Gambling Devices*, 107 F. Supp. 394 (S.D. Ill.), expressed the view that Congress might have the right to proceed against the dealer (R. 5),[1] but held that the commerce power did not extend to forfeiture of machines which had not been shipped in interstate commerce since the passage of the Act.

As pointed out in our brief in the *Denmark* and *Braun* cases, Section 2 of the statute forbids the interstate transportation of gambling devices into states not exempting themselves from the prohi-

[1] Judge Briggle plainly, and the court below inferentially, thus disagreed with the decisions of the district court in the *Denmark* and *Braun* cases.

bition. Section 3 requires dealers in such devices to register annually with the Attorney General and to file monthly their inventories and records of sales and deliveries. The last sentence of Section 3 provides in part:

> and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

Section 7 then provides:

> Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: * * *

The libel of information in this case avers (R. 1) that certain named dealers who had failed to register, as required by Section 3, sold the five gam-

bling devices in question to the intervenor without reporting the details of the sales, as also required by Section 3. The sales were therefore in violation of the last provision of Section 3, quoted above. And in such circumstances the forfeiture provision of Section 7 is applicable, since the gambling devices have been "sold * * * in violation of the provisions of this Act."

Our brief in the *Denmark* and *Braun* cases argues that Congress may choose any appropriate means for the effectuation of the prohibition against transporting gambling devices in interstate commerce, and that to require registration and reports from all dealers in such devices, whether themselves in interstate commerce or not, is a means reasonably adapted to the enforcement of the interstate prohibition. This brief rests in large part upon the propositions there advanced, and is premised upon their acceptance. Those principles go a long way toward establishing the constitutionality of the forfeiture provision here involved.

1. Forfeiture Is a Reasonable Means of Enforcing Section 3.

Section 7, the forfeiture provision, like Section 6, the criminal provision involved in the *Denmark* and *Braun* cases, is a method of enforcing Section 3. If Congress can, upon the ground that the information demanded by Section 3 is necessary to enforcement of the interstate prohibition, impose one sanction upon dealers, whether or not in interstate commerce, who fail to register or report, it

can impose the other. Both are well-recognized methods of law enforcement. "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering* v. *Mitchell*, 303 U.S. 391, 400. And "in the imposition of penalties for the violation of its rules, Congress has a wide discretion. Sanctions may be of various types." *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 442. The sanction of forfeiture imposed by Section 7 has as close a relation to interstate commerce, or to effectuating the policy of keeping slot machines out of such commerce, as has the criminal sanction in Section 6.

The sanction of forfeiture is plainly a method of enforcement which will aid in insuring compliance with Section 3. Dealers may well be induced to register and report by the possibility that their machines may be seized if they fail to do so. They may fear the summary forfeiture procedure which deprives them of business assets immediately more than future criminal penalties. Possibly of greater significance, if potential buyers of slot machines know that the Government can seize any machines purchased from unregistered dealers they will be likely to buy only from registered dealers who have complied with Section 3. In short, the sanction of seizure and forfeiture may be the most effective

means of procuring compliance with Section 3. And since that section lawfully applies to all dealers, whether or not the machines or the dealers have been interstate commerce, the sanction must have the same scope as the provision it is enforcing.

2. Forfeiture of All Unreported Machines, Whether or Not in Interstate Commerce, Is Necessary to Prevent Dealers From Frustrating the Reporting System and Thereby Making It Impossible to Identify the Interstate Machines.

In addition, the reason for making dealers report as to *all* slot machines also justifies the sanction of forfeiture for all such machines. A complete and accurate system of reports is necessary so that the Government can tell which machines have been unlawfully transported interstate. The absence of such reports will make it impossible—or at least more difficult—to determine the status of the particular machines. To hold, therefore, as has the court below, that only machines unlawfully transported in interstate commerce may be seized,[2] will mean that the very act of concealment of a machine's movement by failure to report will protect the machines against seizure.

The purpose of the statute, of course, is to keep slot machines out of states in which they are not wanted. This can best be accomplished by seizing

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[2] No one, we assume, will doubt the legality of seizing machines actually so transported. See *Hipolite Egg Co.* v. *United States*, 220 U.S. 45; *McDermott* v. *Wisconsin*, 228 U.S. 115, 136.

the machines themselves. Normally, this will not be possible while the machines are actually in the course of interstate movement; it must be done afterwards, at a time when the machines' identity and movements, otherwise easily concealable, can best be determined from the reports required to be filed. Frustration of this method of identification should not immunize the machines from seizure. It is, therefore, not only reasonable, but indeed essential to effectuation of the statutory policy, that machines the identification of which is prevented by the dealers' failure to comply with Section 3 be forfeited along with machines which can be proved to have been unlawfully transported in interstate. Since it is the dealers' own failure to report which may make it impossible to prove that the machine has been so transported, Congress may reasonably prevent the dealers who violate the law by not registering and reporting from gaining any advantage from their own wrong doing. And this can be accomplished only if all the machines which dealers may be seeking to protect by not reporting are forfeitable. Cf. *United States* v. *Sischo*, 262 U.S. 165.

A concrete example will show the need for this. The trial judge did not doubt that the machines seized had come into Tennessee from the outside. This can be assumed since the libel asserts that they were Mills machines (R. 1), and the congressional hearings showed that the Mills plant is lo-

cated in Chicago.[3] But the trial court said that it did not appear when the machines had moved in interstate commerce, whether before or after passage of the Act.[4] Without a system of reports the Government may find it difficult to tell when the machines came into Tennessee. The unregistered device which had not passed in interstate commerce since the promulgation of the Act would be indistinguishable from one that had.

In short, enforcement of Section 3, as well as of Section 2, would be rendered difficult or impossible by the very fact of the violation of Section 3. But if the dealer had registered, filed monthly inventories and reports of sales, with the machines identified as required by Section 3, and if the dealers' predecessors in title had done the same, the Government would know whether the transportation had occurred after January 2, 1951, or if the machines had been a part of the dealers' stocks at that time. It is thus not unreasonable for Congress to believe that the public cannot be adequately safeguarded against the interstate transportation of slot machines unless the failure to file the reports, as well as the unlawful transportation, makes the machine forfeitable.

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[3] See Hearings before House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., on S. 3357 and H. R. 6736, p. 180, and our brief in Nos. 40 and 41, pp. 18–19.

[4] The Act was passed twenty months before the libel was filed and six to ten months before the sales.

3. Cases Sustaining the Use of Forfeitures as a Means of Enforcing Informational Requirements.

There is ample precedent for using the sanction of forfeiture to enforce informational requirements. 26 U.S.C. Sec. 2841(c)(1) and its predecessors have long provided that whenever, with intent to defraud the revenue, a false entry is made or a required entry omitted from a distiller's books, or the distiller omits or refuses to provide such books, or does not produce them when sought by a revenue officer—

> the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States.

The validity of forfeitures under this and similar provisions for failure to keep proper records has been sustained in many cases. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395; *Thacher's Distilled Spirits*, 103 U.S. 679; *Grain Distillery No. 8* v. *United States*, 204 Fed. 429 (C.A. 4); *United States* v. *Distillery at Petersburg*, Fed. Cas. No. 14,961 (C.C.E.D. Va.) *One 1941 Buick Sedan* v. *United States*, 158 F. 2d 445 (C.A. 10). The customs laws contain similar provisions for the forfeiture of vessels or merchandise where proper manifests have not been filed 19 U.S.C. 1459, 1460, 1497, 1584, 1585. See *General Import Co.* v. *United States*, 286 U.S. 70.

It is to be noted that the business operating a distillery had not been made illegal by Congress; the Federal Government's interest was solely in the collection of taxes. If it is reasonable to enforce the revenue laws by forfeiting all the real and personal property used by the distiller whenever false reports are filed or an agent prevented from examining the books, the same must be true as to the forfeiture of slot machines for failure to register and file reports. In each instance the information sought is needed to enforce a valid statute, and the property in question is not required to have been used illegally.

4. The Fact That the Burden of Forfeiture May Fall Upon Entirely Innocent Persons Will Not Prevent Seizure.

The same cases and others also establish that the fact that the burden of forfeiture may fall upon an innocent person will not prevent seizure. *United States* v. *Stowell*, 133 U.S. 1; *Dobbin's Distillery* v. *United States*, 96 U.S. 395; *Henderson's Distilled Spirits*, 14 Wall. 44; *Thacher's Distilled Spirits*, 103 U.S. 679; *United States* v. *1960 Bags of Coffee*, 8 Cranch 398; *Various Items* v. *United States*, 282 U.S. 577, 581; *United States* v. *One Ford Coupe*, 272 U.S. 321, 332-333; *Goldsmith-Grant Co.* v. *United States*, 254 U.S. 505, 510-512; *United States* v. *Pacific Finance Corp.*, 110 F. 2d 732 (C.A. 2).

The *Stowell* and *Dobbin* cases involved the forfeiture of property leased from the owner by the

distiller who did not furnish the required information. In each case the owner's innocence was held not to bar forfeiture of his property; in the *Dobbin* case the Court stated (96 U.S. at 401), in a passage subsequently quoted with approval in *Various Items* v. *United States*, 282 U.S. at 581:

> Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.
>
> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault * * *

A number of the above authorities establish that this doctrine applies to purchasers in the position of the Greymere Country Club. The *Thacher* case involved seizure from a purchaser of whiskey, whose predecessor in title had filed false documents. The Court stated (103 U.S. 682):

> Though claimant's counsel sets up the innocence of the present claimant in regard to the fraud or any knowledge of it, it can hardly

> be necessary at this day to reconsider, the doctrine that when the act has been done which the law declares to work a forfeiture of the property, the right of the government to seize the property, and assert the forfeiture, attaches at once and may be pursued by the government whenever and in whose hands soever that property may be found. See *Henderson's Distilled Spirits,* 14 Wall. 44.

In the *Henderson* case the seizure, sustained by the Court, was from a bona fide purchaser who had paid the tax, but after the prior owner had removed the whiskey with intent to defraud.

As far back as 1814, the Court held that a sale did not defeat the Government's right to forfeit, saying (*United States* v. *1960 Bags of Coffee,* 8 Cranch at 405):

> It is true, that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand, if by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.

Subsequently in the *Stowell* case, 133 U.S. at 16-17, the Court again noted that bona fide purchasers were not protected against forfeiture:

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the

> property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, *even to purchasers in good faith,* [Italics supplied.]

The same principle was recognized more recently in *United States* v. *One Ford Coupe* and the *Goldsmith Grant* case, each of which involved the forfeiture of automobiles used in violation of the liquor laws. In the case first cited, the Court said (272 U.S. at 332):

> The claimant contends that § 26 has modified § 3450, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. *Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U.S. 505. * * * The argument that by § 26 Congress manifested the intention to protect generally innocent interests is unfounded.

These cases are sufficient to meet the contention advanced by the intervenor, Greymere Country Club, that it is improper to seize the machines after they have come into its possession. The machines were forfeited at the time of the sale by the un-

registered dealer. The purchaser could have protected itself before paying for the machines by determining whether the dealer was registered and otherwise in compliance with Section 3 of the statute. A purchaser of slot machines is thus in a much better position to protect himself against losing his property because of the unlawful acts of persons previously in possession than was true of the innocent property owners and purchasers in the cases cited above. And purchasers of devices such as slot machines, which are known to be barred from interstate commerce, are much more clearly on notice to be careful when they buy than are owners or purchasers of such perfectly lawful articles as automobiles, whiskey or coffee.

CONCLUSION

For the reasons stated herein and in the Government's brief in Nos. 40 and 41, the judgment of the court below should be reversed.

Respectfully submitted,

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